

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA  
3 Before The Honorable Sallie Kim, Magistrate Judge  
4

5 SILVA, ) No. C 24-02890-SK  
6 Plaintiff, )  
7 vs. )  
8 WHALECO, INC., )  
9 Defendant. )

10  
11 San Francisco, California  
Monday, October 7, 2024

12 TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND  
13 RECORDING 9:31 - 10:02 = 31 MINUTES

14 APPEARANCES:

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1 Monday, October 7, 2024

9:31 a.m.

2 P-R-O-C-E-E-D-I-N-G-S

3 --oOo--

4 THE CLERK: Calling Civil Case Number 24-2890,  
5 Silva v. WhaleCo.

6 Please state your appearances for the record, starting  
7 with the Plaintiff.

8 MS. GOLD (via Zoom): Good morning, your Honor.  
9 This is Sophia Gold on behalf of the Plaintiff.

10 THE COURT: Good morning.

11 MR. FELDMAN (via Zoom): Good morning, your Honor.  
12 Steven Feldman of Latham and Watkins, on behalf of  
13 Defendant.

14 THE COURT: Good morning. So, Mr. Feldman, this  
15 is your motion. So, I'll let you start. I might have some  
16 questions while you're talking. So, I'll just interrupt you  
17 if I need to.

18 MR. FELDMAN: Thank you, your Honor. With your  
19 permission, may I put up a brief PowerPoint to assist with  
20 the discussion?

21 THE COURT: Sure.

22 MR. FELDMAN: Thank you. I'll do that right now  
23 or at least I will attempt my best to do so. Can that be  
24 seen on the screen, your Honor?

25 THE COURT: Yes.

1 MR. FELDMAN: Thank you. Today's matter raises a  
2 straightforward motion to compel. Temu prominently  
3 displayed the terms of use on its website as part of the  
4 sign-in flow that users go through to register an account.  
5 Under Ninth Circuit precedent, including recent precedent in  
6 Keebaugh and Oberstein, both of which are in the past 18  
7 months, the Ninth Circuit has made clear that a sign-in wrap  
8 agreement of the type we have here is enforceable and must  
9 be enforced by district courts when there's a reasonably  
10 conspicuous notice of the terms which is a fact-intensive  
11 inquiry and the user takes some sort of action such as  
12 clicking a button to manifest assent. We have both here.

13 The Plaintiff here -- and there really is no dispute --  
14 Mr. Silva, consented to two registration prompts on the  
15 website. The first one you see on the left where you have  
16 the Continue button, and below that you see "By continuing  
17 to agree to our terms of use and privacy policy, by  
18 continuing, you agree to them." He then clicked continue.  
19 We also know that not only that, after he entered in his  
20 email address, he then received a second registration prompt  
21 which you see, your Honor, on the right-hand side where,  
22 again, directly below the Register button, it says "By  
23 clicking Register, you agree to our terms of use and privacy  
24 policy," and we know that he clicked that as well.

25 THE COURT: Can I stop you just one minute?

1 MR. FELDMAN: Yes, of course.

2 THE COURT: Ms. Gold, so, does your client deny  
3 that this is the situation? He just says that he can't  
4 remember?

5 MS. GOLD: That's correct, your Honor. He does  
6 not recall one way or the other, but we were challenging  
7 specifically in the first declaration the -- the evidence  
8 that they put forward to prove that this was, in fact, the  
9 screenshot that he was shown. And, of course, it's  
10 particularly important in the context of these online  
11 interfaces because they are constantly changing. We know  
12 that from the Defendants, and we know that from other cases  
13 that have proceeded against Temu that there have been  
14 various versions of the screen.

15 So, our point in submitting that declaration was not so  
16 much to say that we have different evidence but that the  
17 evidence that was put forward to prove that these were the  
18 screens was deficient.

19 THE COURT: But you have no evidence, though, to  
20 -- to counter this, as I -- as I understand it?

21 MS. GOLD: Correct. He has no recollection one  
22 way or the other.

23 THE COURT: Okay. All right. Okay. Sorry, Mr.  
24 Feldman. I interrupted you. Go ahead.

25 MR. FELDMAN: Not a problem at all, your Honor.

1 So, yeah, I don't think there's any dispute at this point  
2 about the version that Mr. Silva saw. And, just to be  
3 clear, the cases where someone has said something along the  
4 lines of what I heard Ms. Gold say, which is, you know, I  
5 don't recall what I saw, they've made it clear that that is  
6 not sufficient to create a disputed fact about the creation  
7 of an arbitration agreement. The Whalen v. Facebook case  
8 cited and others have said if a party could get out of a  
9 contract by arguing he didn't recall making it, contracts  
10 would essentially be meaningless.

11 So, we know that he clicked both of these buttons and  
12 that this was the registration that he saw. Now, let's look  
13 at what the Ninth Circuit has said. These are the two --  
14 I'm just going to look at the two most recent cases,  
15 precedential Panel decision from earlier this year. The  
16 Ninth Circuit in the Keebaugh case reversed and remanded a  
17 district court that had not compelled arbitration and  
18 ordered arbitration be compelled in this case where the user  
19 saw the registration prompt you see on the lefthand side.  
20 It's a dark screen. Below that bright blue play button,  
21 this was to sign up for a Game of Thrones Conquest game.  
22 You can see it says, "By tapping Play, I agree to the terms  
23 of service." The Ninth Circuit found there that it was in  
24 contrasting font. It wasn't hidden. It wasn't below, and  
25 that was enough. And if you see on the right-hand side what

1 Mr. Silva undisputably clicked here, I mean, it's far more  
2 clear and conspicuous. You've got, you know, an all white  
3 page. You can see it in the blue bolded font, Terms of Use  
4 and Privacy Policy, quite clearly. It's significantly more  
5 than what the Ninth Circuit had in Keebaugh where the  
6 reversed and remanded and compelled arbitration.

7       Likewise, your Honor, if you look at the Oberstein  
8 decision, an other precedential Panel decision of the Ninth  
9 Circuit just last year, they compelled arbitration with the  
10 registration prompt you see on the left, and the  
11 registration prompt on the left does look somewhat like what  
12 we have in Temu, but I'd argue even -- Temu's is even more  
13 clear and that the font is clearer. The term that -- we  
14 have underlining, which we don't have in the other one. We  
15 have just a bit of a more clear record. And in both of  
16 these cases, the Ninth Circuit compelled arbitration and  
17 found that this is enough that this is reasonably  
18 conspicuous to constitute constructive assent to the terms  
19 and that clicking the Next button or the Play button, in our  
20 case, the register button, was absolutely sufficient to  
21 manifest consent.

22       So, what do we have here? We have contrasting font  
23 color. We have a readily available and apparent hyperlink.  
24 We have an uncluttered interface and proximate notice, and  
25 we have the user, Mr. Silva, unequivocally clicking a

1 button.

2       Now, the case that Plaintiffs talk about, which I found  
3 a little odd because I think it -- it varies squarely, is a  
4 case in Temu's favor here, is the Berman case. This is an  
5 older Ninth Circuit decision, not old, just a couple of  
6 years old but before the Keebaugh and Oberstein case, and  
7 the Ninth Circuit there looked at this registration prompt  
8 you see on the left and said, You know, this isn't enough.  
9 And then why isn't this enough? Well, look at what we have  
10 on the bottom there. We've got, as the Ninth Circuit said,  
11 tiny gray font, barely legible to the naked eye, de-  
12 emphasized by the overall design, considerably smaller than  
13 everything we saw else, and what they said the antitheses of  
14 conspicuous. And I'd argue, your Honor, that I think it's  
15 pretty clear from just the visual record and just looking at  
16 these things that Temu's registration prompt is nowhere near  
17 that. In fact, it's on the furthest end of what I'd call  
18 the spectrum of conspicuous. And, so, if we look at the  
19 Ninth Circuit case law here, whether they said, Well, not  
20 conspicuous in Berman -- that's what we just saw right over  
21 there, all gray, de-emphasized, tiny font. You can't see  
22 it. What is enough? Well, Keebaugh is enough even though  
23 it kind of, honestly, to me doesn't look that clear, but  
24 they said that's enough. It's in contrasting color. It's  
25 right there. You could see it. And they said in Oberstein,

1 well, that's enough, and that's a little bit more  
2 conspicuous. And then you have what we have here, which is  
3 really kind of a gold plated standard of being quite clear,  
4 quite conspicuous, bold, blue, underlined. And, of course,  
5 Mr. Silva saw the notice two times. So, he saw it the first  
6 time when he had to enter in his email and click Continue,  
7 and then he saw it again on the Registration sign.

8 So, your Honor --

9 THE COURT: Let me stop you for a minute, Mr.  
10 Feldman.

11 MR. FELDMAN: Yes.

12 THE COURT: Ms. Gold, let me ask you this.  
13 Assuming that this is what Mr. Silva actually saw, do you  
14 agree that this is conspicuous enough under the Ninth  
15 Circuit standard to satisfy a motion to compel?

16 MS. GOLD: No, your Honor. And we do make that  
17 argument in that papers.

18 THE COURT: Why? Why? What's the difference  
19 between Keebaugh and Oberstein and Temu? And this is  
20 assuming that this is what your client saw.

21 MS. GOLD: Sure, your Honor Well, obviously, we  
22 know from the Ninth Circuit that this analysis is always  
23 going to be factually specific. It is always going to be  
24 incredibly tailored to the screen that's at issue. And here  
25 the screens are designed to draw your attention, your --



1 your eye to the bright orange button that's Continue or  
2 that's Register, and it's only --

3 THE COURT: How is that different from Keebaugh?  
4 Because Play is in bright blue, and I agree it's actually  
5 pretty hard to see Terms of Service on the lower right-hand  
6 side, and it's not underlined, and it's not in a different  
7 font, and it's against that dark black background. It's  
8 pretty hard to see. How is Play in Keebaugh different from  
9 Register in Temu?

10 MS. GOLD: Well, first of all, I also did ant to  
11 note that I think this screen is a little bit misleading in  
12 the sense of you're not just seeing a white screen if you  
13 were to go to Temu's website. And if you were to look at  
14 the original declaration, that's not what it shows. So,  
15 they're -- they're taking this tiny screenshot and  
16 pretending that that's what the entire computer screen looks  
17 like, but if you were to actually go to the -- to the  
18 website and you go through and you look at the declaration,  
19 the -- the whole background is filled with other eye  
20 distracting text and images, what you are looking at. And  
21 then there is this small box within that much larger context  
22 of the page, and I think it's very important, the Ninth  
23 circuit has counseled, to look at the context of the page of  
24 what you are doing when you're clicking the screen. So,  
25 you're already visually overwhelmed with plenty of stimuli

1 with various colors, various images going on, and this box  
2 pops up and it's click the orange, get past this box. I  
3 mean --

4 THE COURT: Well, is the box itself plain -- plain  
5 white?

6 MS. GOLD: I believe the box itself is plain  
7 white. But the --

8 THE COURT: In other words, you're talking about  
9 the visual stimuli before you get to this box, is that  
10 correct?

11 MS. GOLD: No. It's on the same page as the box.  
12 So --

13 THE COURT: I'm confused. Sorry.

14 MS. GOLD: It's --

15 THE COURT: I'm going to look at the original  
16 exhibit. Hang on just a second.

17 MS. GOLD: Yeah.

18 MR. FELDMAN: Your Honor, you can see this on  
19 pages two and three of the Trin declaration, which I believe  
20 is Document 17-1 on the record. If you look at page two,  
21 you see the white box pop up for the first registration  
22 prompt you saw.

23 THE COURT: Exhibit A -- Exhibit A of the Trin  
24 declaration? Okay.

25 MR. FELDMAN: Correct.

1 THE COURT: I'm taking a look at it right now.

2 (Pause.)

3 MR. FELDMAN: It -- it's in the actual Trin  
4 declaration itself. You don't have to pull up the exhibit I  
5 don't believe.

6 THE COURT: Oh, I see. Got it. I was looking at  
7 the exhibit.

8 MR. FELDMAN: That's page two and three of the  
9 Trin declaration.

10 THE COURT: Okay.

11 MR. FELDMAN: On page two you see the first  
12 registration prompt and how it pops up above the screen in  
13 -- in white and then page three you see the second  
14 registration prompt you saw --

15 THE COURT: Got it.

16 MR. FELDMAN: -- and it pops up.

17 THE COURT: So, what you're talking about, Ms.  
18 Gold, is that sort of grayish background that's got the  
19 product, whatever the product is that the person's looking  
20 at? Is that what you're talking about in terms of the  
21 distraction?

22 MS. GOLD: Yes. Are you on page two or are you on  
23 page three, just so we're --

24 THE COURT: I'm on page two. Page two and page  
25 three have the same background.

1 MS. GOLD: They do have the same background.

2 THE COURT: It's a -- it's a -- it looks like a  
3 cooler of some type, and then it's -- it's very faded. So,  
4 I can't tell exactly what it is, but it looks like a cooler  
5 in the background.

6 MS. GOLD: Right. And, so, I believe that the --  
7 the context of this screen is important, right. You're  
8 shopping. You're saying, I'm going to buy this cooler. I'm  
9 going to add it to my cart, and I want to go through the  
10 process and get -- get through this as quickly as possible.

11 And, so, you're already overloaded with a lot of  
12 information about the cooler. You're thinking about the  
13 cooler. I want to get to this cooler, checkout process as  
14 quickly as possible, get to the part where I actually need  
15 to do something. And then you get this orange popup. And  
16 then the impulse that's intentionally designed, of course,  
17 to be this way is to enter your phone number and then click  
18 continue to --

19 THE COURT: Well, is there any case law that says  
20 that because the impulse is designed to make you want to  
21 click on it that there's a problem? I mean, isn't the test  
22 under the Ninth Circuit the conspicuous nature of the  
23 notice? And here we have two. I -- I understand what  
24 you're talking about, the background, because I'm looking at  
25 it right now. But in terms of conspicuousness, what does

1 the impulsive nature of it have to do with the Ninth Circuit  
2 standard?

3 MS. GOLD: Well, certainly, I think that the fact  
4 that there are dark patterns, dark patterns are beginning to  
5 be talked about in the case law and in the legislature for  
6 specifically designing an interface.

7 THE COURT: I'm looking at the Game of Thrones in  
8 Keebaugh, and that looks really dark. And I'm looking at  
9 the Temu, and I think, Okay, this is good because the white  
10 is contrasting with the gray in the back. So, it pops out.  
11 And then the blue underlined Terms of Use and Privacy Policy  
12 are at the bottom in a different color and a different --  
13 and underlined against the white background.

14 MS. GOLD: Fair enough, your Honor, although I  
15 think in this first page I think there's a real difference  
16 in the sense of you're not even -- we know that our client  
17 entered their email from the declaration, and -- and you  
18 don't even get to the -- the tiny font of "By continuing,  
19 you agree to our terms of use" unless you were to look down  
20 and click one of those buttons, one of the Facebook or the  
21 Apple, the single sign-on buttons. There's a spacial gap  
22 which the Ninth Circuit has said is important between where  
23 you click and where the terms are actually provided to the  
24 consumer. In other words, your attention can only -- only  
25 needs to be on the middle of the page, whereas you have the

1 visual proximity -- that's the term that's used in Sellars  
2 and in Berman, on the -- the Keebaugh page between the blue  
3 button, and then immediately below it, you have the terms  
4 that are provided where --

5 THE COURT: Well, there's something between it.  
6 There's Play in bright blue, and then there's a line that I  
7 can't read, and then it has the Terms of Service below that.  
8 So, there is some distance between Play and Terms of  
9 Service. There's one line between it, and I don't know. I  
10 can't see it clearly enough to see what it is. It's too  
11 small.

12 MR. FELDMAN: Ironically -- ironically, your  
13 Honor, that actually is the line that says, "By tapping  
14 play, I agree the terms of service," and that's --

15 THE COURT: I see.

16 MR. FELDMAN: -- what the Ninth Circuit found  
17 sufficient.

18 THE COURT: Okay.

19 MS. GOLD: Right. So, it's right there. It's --

20 MR. FELDMAN: Which I think supports --

21 MS. GOLD: You have to --

22 MR. FELDMAN: -- Plaintiff's claim.

23 MS. GOLD: You have to look at the blue button.

24 And, so, then your eye is also on that portion of the page.

25 And I think at least on this first page, it would -- it's

1 quite problematic to me that you don't have to look down.

2 THE COURT: But on the -- this is an unusual case  
3 because your client actually had to sign in twice. In other  
4 words, even if the first page didn't exist, the second page  
5 looks like under Keebaugh is similar because the Register  
6 button, the orange, then the Terms of Service are right  
7 underneath the orange. So, I don't know. In Keebaugh and  
8 Oberstein, there weren't two places where the person had to  
9 press continue or play or register or whatever, right?

10 MS. GOLD: Certainly I wouldn't call it unusual.  
11 I think it -- it's in a lot of online interfaces. In the  
12 Bark Box case that we cited from the Central District, there  
13 were multiple points where they informed customers about the  
14 Terms of Use.

15 THE COURT: But in terms of Keebaugh and  
16 Oberstein, it differs from them in that it has two different  
17 places, right?

18 MS. GOLD: I don't remember any discussion in  
19 Keebaugh or Oberstein about there being two different  
20 places.

21 THE COURT: Okay.

22 MS. GOLD: There was --

23 THE COURT: Mr. Feldman, do you know if there were  
24 two different places in Keebaugh and Oberstein?

25 MR. FELDMAN: I don't recall sitting here right

1 now, your Honor. But what I -- what I would say is there's  
2 no question that the -- I think the argument that Ms. Gold  
3 just made about the terms, you know, two things. Number  
4 one, I think the gray background that we've talked about  
5 that Ms. Gold highlighted only actually supports our  
6 argument. The white box that pops out when the background  
7 is grayed on only de-emphasizes the surrounding Web pages  
8 and emphasizes for the user the actual popup screen that  
9 they receive for the Registration button. I'm not aware of  
10 any case law that says you need to take over the user's  
11 entire full screen in order for a term to be conspicuous or  
12 agreement to be conspicuous. It just needs to be clear.

13 And, with regard to exactly where the prompt is, there  
14 is no Ninth Circuit case law saying it must be in a specific  
15 place. Indeed, there are numerous cases, the Lee v.  
16 Ticketmaster case that we've cited, that have enforced  
17 notice of terms of use that were displayed three lines lower  
18 than the action button.

19 The question, it's a fact-intensive inquiry of just  
20 simply was there reasonably conspicuous notice to a  
21 reasonable user. And I think you can't really escape the  
22 conclusion here that this user, Mr. Silva, saw not one but  
23 two prompts. They were conspicuous. They were blue. they  
24 were bolded. They're clear. It's clearer than Keebaugh.  
25 It's clearer than Oberstein or at least as clear if not



1 clearer. There's just no daylight to allow for those cases  
2 to be compelled to arbitration and this one somehow not. I  
3 mean, I don't think any of the case law that's been cited  
4 says otherwise.

5 THE COURT: Okay.

6 MR. FELDMAN: In fact, it's squarely --

7 THE COURT: All right. I interrupted you, Mr.  
8 Feldman. So, why don't you continue with your presentation.  
9 I'm going to do that because I want to -- I'd like to hear  
10 from Ms. Gold right after to see what she has to say.

11 MR. FELDMAN: No problem, your Honor. I mean, I  
12 think at the end of the day, I don't have much more to say.

13 THE COURT: Okay.

14 MR. FELDMAN: I think this is a very  
15 straightforward case. We provided the Plaintiff with  
16 reasonably conspicuous notice of our terms under the law.  
17 They consented by clearly the Continue and Register buttons.  
18 We provided the notice. They received it twice. Either one  
19 could be sufficient. And, therefore, the arbitration should  
20 be compelled under applicable case law, including the Ninth  
21 Circuit's precedential decisions directly on point in just  
22 the past 18 months.

23 THE COURT: Okay. All right. Ms. Gold, I'll hear  
24 from you. And you can take this down from the Share screen.  
25 Thank you.

1 MR. FELDMAN: Thank you, your Honor.

2 MS. GOLD: Thank you, your Honor.

3 I wanted to make two quick points that were not  
4 addressed in Mr. Feldman's presentation. One is that there  
5 is still evidentiary gaps here, and they've now had two  
6 bites at the apple to try to meet their burden of proof on  
7 the motion to compel to prove our Plaintiff agreed to these  
8 terms. And -- and they're, frankly, doing a little bit of a  
9 shoddy job at it.

10 We specifically complained in our opposition that --  
11 and in our objections that the declarant was simply  
12 asserting things like Temu's records show that the Plaintiff  
13 agreed to these terms, that this was the screen that the  
14 Plaintiff saw, that the Plaintiff entered his email address.  
15 But they're not actually providing those records.

16 What -- first of all, what records is the declarant  
17 actually looking at? Were those records kept in the  
18 ordinary course of business? Why haven't those records been  
19 provided to us? It violates all sorts of rules in terms of  
20 the Best Evidence Rule and the rule against hearsay, et  
21 cetera, et cetera, to just assume and conclude that this is  
22 what the records show without giving us the opportunity to  
23 test those assertions, because too many times we've seen it  
24 where we get the records, and they don't match, that there  
25 is a discrepancy between the email that was provided or that

1 there is some sort of issue between the sign up or they're  
2 not quite as clear as a declarant might say they are.

3 So, that is problem number one is that this is still a  
4 declaration that's lacking, and they've now been given two  
5 opportunities to give you a better declaration with better  
6 evidence actually proving Plaintiff agreed to this, and --  
7 and they're still trying to float by.

8 The second issue that we haven't addressed is what this  
9 arbitration provision actually says and what this  
10 arbitration provision specifically says about batching and  
11 what it -- what it tries to do to create this mass  
12 arbitration process that is beneficial to Temu and not so  
13 beneficial to consumers. And, of course, you know, in the  
14 background here, this is part of a --

15 THE COURT: Is this an unconscionability argument?

16 MS. GOLD: This is, your Honor.

17 THE COURT: Okay. So, I know that you contest  
18 that the arbitrator has the ability to determine  
19 unconscionability. In other words, if I decide that the --  
20 that there's an arbitration agreement and I send this to the  
21 arbitrator, I know there's a dispute about whether or not  
22 the arbitrator decides unconscionability or whether I decide  
23 unconscionability.

24 I looked at the -- I looked at the agreement, and I got  
25 to tell you it looks like the arbitrator has the ability to

1 determine unconscionability, not me. And the case law is  
2 pretty clear that I have to defer to that if I think that  
3 the contract language is clear.

4 MS. GOLD: Normally I would agree with that, your  
5 Honor, but I would refer you to Judge Chen's very recent  
6 decision. It was in July in the Pendolfi -- Pendolfi I  
7 believe is the case title, in which it was the same thing.  
8 So, Judge Chen ended up finding that a batching provision  
9 was unconscionable in the terms of service. There was a  
10 delegation provision, but he found that the delegation  
11 provision was unconscionable for the same reason that the  
12 batching provision was unconscionable. So, you're almost  
13 putting the cart before the horse by enforcing the  
14 delegation provision vis-a-vis this batching procedure. So,  
15 you're going to have one arbitrator potentially decide  
16 whether an arbitration agreement is unconscionable on behalf  
17 of 100 consumers who may or may not even have like claims  
18 necessarily on that specific issue because I don't know.  
19 The batching provision is vague. If we're just challenging  
20 that threshold issue at the outset, is that -- are we  
21 allowed to batch even if the claims are about a data breach  
22 or -- I'm not sure how that's going to work because it's  
23 very vague.

24 So, Judge Chen really does do a --

25 THE COURT: I'll take a look at it.

1 MS. GOLD: -- complete analysis.

2 THE COURT: Yes. Is that case on appeal?

3 MS. GOLD: I think it is, your Honor.

4 THE COURT: I can't imagine that would be an  
5 appealable issue.

6 MR. FELDMAN: It is.

7 THE COURT: Okay.

8 MS. GOLD: It is. Although, I believe I heard  
9 once that Judge Chen was the least overturned jurist in the  
10 Ninth Circuit. So, we'll see if that ends up being the case  
11 or not. Regardless, he --

12 THE COURT: I'm not sure that's accurate.

13 MS. GOLD: It might not be anymore, but he  
14 certainly provides a very in-depth analysis. It's lengthy.

15 And on the specific provision, there is two specific  
16 aspects that I have a problem with, and all -- in the  
17 broader context of the Ninth Circuit, I think it will be  
18 very interesting because all of these batching provisions  
19 are very new, and there's not a lot of case law on it, but  
20 the couple of cases that have come out about batching  
21 provisions -- and they're all somewhat different, to try to  
22 prevent mass arbitrations -- have been largely unfavorable.  
23 I'm not sure if I'm aware of a case that has held that a  
24 batching provision was fine. The best -- the most I've --  
25 I've seen is, you know, it's for the arbitrator to decide.

1        So, the first point is it attempts to penalize  
2 attorneys for having multiple clients or for clients  
3 choosing the same attorneys or for attorneys from choosing  
4 to work together on a specific case. And California law is  
5 very clear and is very strong on this point, that you cannot  
6 restrict an attorney's practice of law, that when you have  
7 an agreement that tries to impinge on an attorney's ability  
8 to represent a client, that is unethical, and that is also  
9 going to be unconscionable for the same reasons. And that's  
10 exactly what they're trying to do here.

11        So, their provision is not based on the types of claims  
12 consumers raise. It's based on who the counsel are and who  
13 you're getting -- even more vaguely, who you're getting  
14 assistance from, which I -- I don't know what that means.

15        So, if I -- I did receive -- and that's the basis of my  
16 declaration in this case -- a call from another firm that is  
17 mass arbitrating against Temu similar claims. I don't know  
18 if that call constitutes assistance for my clients in this  
19 case or not, but maybe it will in the future, and the --  
20 they let me know the existence of these mass arbitrations,  
21 but if I were to try to work together with these attorneys  
22 in any sort of way, certainly more formally, then my clients  
23 could get sucked into the batch that's proceeding already on  
24 behalf of those other clients. And, similarly, if I attempt  
25 to obtain more clients or if more clients contact me about

1 similar issues against Temu, then they are suddenly going to  
2 be batched with this other group. And, so, you're  
3 penalizing clients and attorneys simply for the fact that an  
4 attorney represents more than 25 clients with similar claims  
5 against Temu, and that's problematic --

6 THE COURT: Okay.

7 MS. GOLD: -- under California law.

8 THE COURT: Let me hear from Mr. Feldman on your  
9 last two points. Thank you.

10 MR. FELDMAN: Thank you, your Honor. So, let me  
11 briefly address each point. So, the first I believe is  
12 about the declaration. The second is about the  
13 unconscionability batching.

14 So, on the declaration, I would say a couple of things.  
15 First of all, I don't think there's been any dispute, in  
16 fact, Ms. Gold made it clear in response to your questions  
17 at the beginning of the hearing that her client -- there is  
18 no dispute that this is the registration flow that he went  
19 through. There's no evidentiary basis to believe that he  
20 didn't go through this dispute. So, I think this is kind of  
21 a -- a side show.

22 But, to be clear, the Trin declaration makes clear from  
23 a person with knowledge about exactly what Mr. Silva here  
24 saw. It's the exact type of declaration that courts within  
25 this Circuit have relied on over and over and over again in

1 many cases that we cited in our briefing, and it makes clear  
2 that at -- in February of 2024, when Mr. Silva signed up,  
3 this is exactly what he saw. This is what a user would see.  
4 And, this is, in fact, what he did see as you looked at on  
5 pages two and three of the declaration that we just went  
6 through. We don't think there's any dispute here, and I  
7 haven't heard any dispute here. That said, out of an  
8 abundance of -- I wouldn't even say an abundance of caution,  
9 but just to put any doubts to rest, we issued as well a  
10 supplemental declaration with our reply brief, which is  
11 permitted under Rule 73(c), as your Honor's aware, and made  
12 clear that to the extent they had any doubt about whether he  
13 was, you know, very clear on exactly what Mr. Silva saw, we  
14 were going to make clear that, yes, this is exactly what he  
15 saw at the specific time period. He saw both prompts. He  
16 agreed to both prompts. And courts in this Circuit  
17 regularly rely on not just the original declarations but the  
18 supplemental declarations in granting motions to compel  
19 arbitration of the exact type we have here so --

20 THE COURT: I don't have a problem with the  
21 evidence. I think that the evidence --

22 MR. FELDMAN: Okay.

23 THE COURT: -- is sufficient to show --

24 MR. FELDMAN: Okay.

25 THE COURT: -- the terms.



1 MR. FELDMAN: So --

2 THE COURT: Let's talk about the batching and the  
3 unconscionability.

4 MR. FELDMAN: Yeah.

5 THE COURT: That's interesting to me.

6 MR. FELDMAN: Okay. So, good. So, let me -- let  
7 me -- let me try to hits two points there. First, at the  
8 threshold issue that your Honor put her finger on, which I  
9 think is exactly right, the arbitration agreement includes  
10 an express delegation clause delegating issues to the  
11 arbitrator, essentially all issues to the arbitrator. I  
12 think the question for this Court is is there a valid  
13 agreement, was there a reasonably conspicuous notice of the  
14 terms, did he assent. If so, all other issues should go to  
15 the arbitrator. There's the Fly Low Falcon v. Amazon Ninth  
16 Circuit case from 2024, which has made clear that when the  
17 parties have clearly and unmistakably delegated questions to  
18 the arbitrator, the court need not conduct further inquiries  
19 beyond the existence of the arbitration agreement. So, once  
20 your Honor finds there is an agreement, that should be the  
21 end of it, and we think that's clear. So, there's no need  
22 to go further.

23 But let's just say you did for the sake of argument and  
24 to respond to Ms. Gold's points.

25 THE COURT: Yeah. What about Pendolfi? I'm

1 curious to see what you have to say about that.

2 MR. FELDMAN: Yes. So, two things. First of all,  
3 I'd just have to say you'd have to obviously find for any  
4 term to be unconscionable, both procedural and substantive  
5 unconscionability. And, to be clear, the only argument that  
6 the other side has made about how this contract could be  
7 procedurally unconscionable is that it's an adhesion  
8 contract. That's what they argue in their briefing. And,  
9 to be clear, the Ninth Circuit in a precedential decision in  
10 2016, the Mohammed v. Uber Technologies case, which we've  
11 cited, made very clear that "An arbitration agreement is not  
12 adhesive" -- and I'm quoting it -- "if there is an  
13 opportunity to opt out of it." And there is no dispute here  
14 that our arbitration agreement provided for 30 days for Mr.  
15 Silva or anyone else to opt out of the agreement. So, we  
16 think under binding Ninth Circuit precedent, there simply is  
17 not procedural unconscionability, and that ends any inquiry  
18 that this Court would ever need to make, even if the term --  
19 these issues were not delegated to the arbitrator, which  
20 they are.

21 But let's just say you got beyond both of those  
22 questions. To be clear, the cases that Ms. Gold cites  
23 actually talk about bellwether provisions, not specific  
24 batching provisions like we're talking about here -- that's  
25 not their focus -- and the narrow circumstances in which the

1 -- the bellwether provision can be found unconscionable.

2 And let me just describe what the difference is because the  
3 difference is incredibly important.

4       The bellwether provisions that those cases were talking  
5 about basically say, Hey, you know what? If there is, you  
6 know, 500 cases that are filed by the same firm that are a  
7 bunch of different plaintiffs but arise out of the exact  
8 same facts, we're going to actually send let's say 10, 20 of  
9 them at a time to be decided by an arbitrator. That  
10 arbitrator's going to act -- that -- those are going to be  
11 bellwether cases. And, you know, after those are decided,  
12 we'll move on to the next ones with the law that we find.  
13 And then after those are decided, we'll move on to the next  
14 ones. And what courts, including Judge Chen, and others  
15 have said about provisions like that is, Well, we have some  
16 concerns about that because there could be some plaintiff  
17 who files a case and they might not be able to have their  
18 arbitration heard for seven years because you're going 10 at  
19 a time through this bellwether provision, and you might be  
20 number, you know, 9072 on the list. But two things about  
21 that. Number one, most importantly, that doesn't exist  
22 here. That's just -- there's no argument that's not present  
23 in this case. What we have --

24           THE COURT: Are you saying that the facts of this  
25 case are different from Pendolfi?

1 MR. FELDMAN: Yes. We don't have a bellwether  
2 provision. We have a -- just a batching provision that  
3 specifically says, importantly, that the cases that would be  
4 batched together would be heard "concurrently". So, there's  
5 no dispute that even if the cases were batched -- and I just  
6 have to make clear at this point that we are unaware of any  
7 evidence that this case would be batched with anything else.  
8 I mean, Ms. Gold talked about some secret phone call with  
9 some other counsel that we're not aware of, but I can tell  
10 you from my clients that we're not aware of anything this  
11 would be batched with. And, so, there's not even standing  
12 to raise this argument. But, to be clear, the batching  
13 provision says all the matters would be handled  
14 concurrently, just the way you'd have if cases were  
15 consolidated in a Federal Court. So, it removes all of the  
16 concerns that you see in those bellwether cases where there  
17 would be delay. There wouldn't be any delay. But, again --  
18 so, I think that answers the substantive unconscionability  
19 question and why there clearly is none here because that  
20 delay would never happen. But, again, there's no evidence  
21 at all that that's even at play in this case whatsoever.  
22 And we don't think he'd even get to substantive  
23 unconscionability.

24 THE COURT: All right. I'll go back and look at  
25 the language. I'll read Pendolfi especially.

1           So, thank you for the argument. I'm going to take this  
2 under submission. I'm going to go look at a couple of  
3 things, and then I'll issue a ruling.

4           MR. FELDMAN: Thank you, your Honor.

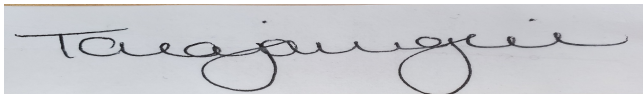
5           THE CLERK: We're in recess.

6           (Proceedings adjourned at 10:02 a.m.)  
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CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.



Echo Reporting, Inc., Transcriber

Tuesday, October 8, 2024